

Before the Building Practitioners Board

	BPB Complaint No. CB26392
Licensed Building Practitioner:	Prem Chand (the Respondent)
Licence Number:	BP132537
Licence(s) Held:	Carpentry

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Draft Decision Date:	2 April 2024
Final Decision Date:	15 May 2024

Board Members:

Mr M Orange, Chair, Barrister (Presiding)
Ms K Reynolds, Construction Manager
Mr G Anderson, LBP, Carpentry and Site AoP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Disciplinary Finding:

The Respondent **has** committed a disciplinary offence under section 317(1)(da)(ii) of the Act.

The Respondent is fined \$1,000 and ordered to pay costs of \$500. A record of the disciplinary offending will be recorded on the Public Register for a period of three years.

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Summary of the Board’s Decision

[1] The Respondent failed to provide a record of work on completion of restricted building work. He is fined \$1,000 and ordered to pay costs of \$500.

The Charges

[2] Under regulation 10 of the Complaints Regulations, the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies. Having received the report, the Board decided that regulation 9 applied to some but not to all of the allegations.

Regulation 10 Decision

- [3] In this matter, the disciplinary charges the Board resolved to further investigate¹ were that the Respondent may, in relation to building work at [Omitted] Auckland have failed, without good reason, in respect of a building consent that relates to restricted building work that he or she is to carry out or supervise, or has carried out or supervised, (as the case may be), to provide the persons specified in section 88(2) with a record of work, on completion of the restricted building work, in accordance with section 88(1) of the Act contrary to section 317(1)(da)(ii) of the Act.

Regulation 9 Decisions

- [4] The complaint to the Board also contained allegations that the Respondent had:
- (a) carried out or supervised building work in a negligent or incompetent manner (s 317(1)(b) of the Act);
 - (b) breached the code of ethics prescribed under section 314A of the Act (s 317(1)(g) of the Act);
 - (c) conducted himself or herself in a manner that brings, or is likely to bring, the regime under this Act for licensed building practitioners into disrepute (s 317(1)(i) of the Act).
- [5] With regard to the Code of Ethics allegation, the Board decided that regulation 9(a) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (a) *it does not come within the grounds for discipline;*

- [6] The Code of Ethics was introduced by Order in Council by way of the Building (Code of Ethics for Licensed Building Practitioners) Order 2021. The Order specified that it would come into force on 25 October 2022. As such, the disciplinary provision in section 317(1)(g) of the Act only applies to conduct that occurred after 25 October 2022. The matters complained about with respect to the Code of Ethics occurred prior to that date. It follows that they do not come within the specified ground of discipline.

- [7] With regard to the other allegations made, the Board decided that regulation 9(f)(ii) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

- (f) *the investigation of it is—*

¹ The resolution was made following the Board's consideration of a report prepared by the Registrar in accordance with regulation 10 of the Complaints Regulations.

(ii) *unnecessary;*

- [8] In considering whether the investigation of a complaint is necessary, the Board must consider the directions of the courts regarding the threshold for matters to be dealt with as a disciplinary matter. In short, the conduct has to fall seriously short of expected standards of conduct.²
- [9] On this basis, the Board has decided that whilst there was some evidence of building work that may not have been completed to an acceptable standard or of conduct that may have been disreputable, the matters raised did not reach the threshold for further investigation to be undertaken. The Board also noted that some of the work complained about related to other trades, or were contractual in nature.

Draft Decision Process

- [10] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers necessary prior to it making a decision.
- [11] Ordinarily, the Board makes a decision having held a hearing.³ The Board may, however, depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.⁴
- [12] In this instance, the Board decided that a formal hearing was not necessary. The Board considered that there was sufficient evidence before it to allow it to make a decision on the papers. It noted, however, that there may have been further evidence in relation to the matter that the Board was not aware of. To that end, it issued a Draft Decision. The Respondent was provided with an opportunity to comment on the draft findings and to present further evidence prior to the Board making a final decision. The Board further noted that if the Respondent requested an in-person hearing, then the Draft Decision would be set aside, and a hearing would be scheduled.
- [13] The Respondent did not seek an in-person hearing.

Evidence

- [14] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed⁵. Under section 322 of the Act, the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74

³ Regulation 10 of the Complaints Regulations.

⁴ Under Clause 27 of Schedule 3 the Board may regulate its own procedure and it has summary jurisdiction, which allows for a degree of flexibility in how it deals with matters: *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

Failure to Provide a Record of Work

- [15] A Licensed Building Practitioner must provide a record of work for any restricted building work that they have carried out or supervised to the owner and the Territorial Authority on completion of their restricted building work.⁶
- [16] There is a statutory requirement under section 88(1) of the Building Act 2004 for a licensed building practitioner to provide a record of work to the owner and the territorial authority on completion of restricted building work⁷ unless there is a good reason for it not to be provided.⁸

Did the Respondent carry out or supervise restricted building work

- [17] The Respondent was engaged to carry out and/or supervise building work on a new residential dwelling under a building consent. His work included work on the primary structure and the external moisture management system of a residential dwelling.⁹ As such, his work included restricted building work for which a record of work had to be provided.

Was the restricted building work complete

- [18] The Respondent's work was carried out between September 2020 and February 2021. The build as a whole was completed in March 2023.
- [19] February 2021, when the Respondent's work came to an end, was the completion date for the Respondent's restricted building work, and it was when a record of work was due.

Has the Respondent provided a record of work

- [20] The Respondent provided a record of work dated 8 July 2023 to the Board on 5 March 2024 as part of its investigations and only after the complaint had been made. The record of work was not provided on completion.

Was there a good reason

- [21] No good reasons were put forward by the Respondent. There was evidence of a commercial dispute. Whilst the non-payment of invoices has not been referred to as a reason, the Respondent should note that the Board has repeatedly stated that a Record of Work is a statutory requirement, not a negotiable term of a contract. The requirement for it is not affected by the terms of a contract, nor by contractual disputes. Licensed building practitioners should now be aware of their obligations to provide them, and their provision should be a matter of routine.
- [22] The Respondent should also note that the requirement is on the licensed building practitioner to provide a record of work, not on the owner or territorial authority to

⁶ Section 88(1) of the Act.

⁷ Restricted Building Work is defined by the Building (Definition of Restricted Building Work) Order 2011

⁸ Section 317(1)(da)(ii) of the Act

⁹ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011

demand one. He is required to act of his own accord and not wait for others to remind him of his obligations.

Further Evidence and Submissions Received

[23] Following the Board issuing a Draft Decision, it received submissions and further evidence from both the Respondent and the Complainant. It has taken the further evidence and submissions into account when making this Final Decision.

Respondent's Submission

[24] In his submissions, the Respondent stated:

1. record of works were not provided to complaintant as the work was not completed due to draniange works .

[25] Records of work are due on the completion of restricted buiding work. Drainage work is not restricted building work as defined in the legislation, as it is not part of the primary structure or external moisture management system of a residential dwelling. As such, the non-completion of drainage work has no bearing on the Respondent's record of work and when it was due.

[26] The Respondent also submitted:

5. I was following normal procedure to issue the RECORD OF WORKS AFTER COMPILATION OF ENTIRE PROJECT .Then issue the records of works

[27] While providing a record of work at the end of a project may be common, that practice carries risks. If the project does not follow the normal path to overall completion, a Licensed Building Practitioner risks a complaint being made about them if their restricted building work has been completed, but the project as a whole has not, and they do not provide a record of work. The Respondent should change his usual practice.

[28] The Respondent also made a submission about the Board's penalty order, which will be discussed in relation to it.

Complainants' Submission

[29] The Complainants made an extensive submission, much of which relitigated the original complaint and sought further action on other grounds of discipline. Specific items that the Board will respond to are addressed below.

[30] The Complainant also made submissions in relation to the penalty imposed. Again, they will be discussed in relation to it.

[31] The Complainants' submission, in the main, focused on contractual matters. The Complainant should note that disciplinary action under the Act is not designed to redress issues or disputes other than when the conduct reaches the threshold for

consideration as unethical or disreputable conduct. In *McLanahan and Tan v The New Zealand Registered Architects Board*,¹⁰ Collins J. noted that:

“... the disciplinary process does not exist to appease those who are dissatisfied The disciplinary process ... exists to ensure professional standards are maintained in order to protect clients, the profession and the broader community.”

- [32] In this matter, the Board made a decision that the contractual matters complained about arose prior to the Code of Ethics being in force and that the disrepute allegations did not reach the threshold for further consideration. The new evidence and additional submissions have not changed the Board’s view that regulation 9 of the Complaints Regulations applies. There are more appropriate judicial forums within which contractual matters can and should be pursued. This remains the position notwithstanding the following submission:

In essence we have lost \$450,000 in total due to this delay in handing over the Record of work and the board has fined him only \$1,500.

- [33] The Board does not accept that the failure to provide a record of work can be the sole reason for a loss of that magnitude. This is primarily because a Determination¹¹ has been issued, which states that not having a record of work is not a reason to refuse to issue a Code Compliance Certificate because records of work have nothing to do with Building Code or building consent compliance. They are simply a record of who carried out or supervised what restricted building work.

- [34] Another matter raised was the provision of documents other than a record of work. The Complainant stated:

Further, Prem Chand is not just withholding the personal record of works, but also all of the documents he holds because the contract is a full build contract. We need the Board to enforce all producer statements and associated documents are handed over to us.

- [35] The Act does not have any disciplinary provisions in relation to the retention of documents other than a record of work. Further, it does not have the ability to compel any actions, such as providing documentation.

Consideration of Submissions

- [36] On the basis of the above, the Board does not consider that a different decision should be made. Both the record of work and the regulation 9 decisions are affirmed.

¹⁰ [2016] HZHC 2276 at para 164

¹¹ BD23.14 Regarding the authority’s exercise of its powers of decision in respect of a refusal to amend a building consent for Restricted Building Work carried out to a relocated house MBIEBH Determination 2013/030, 28 May 2013

Board's Decision

[37] The Respondent **has** failed to provide a record of work on completion of restricted building work.

Penalty, Costs and Publication

[38] Having found that one or more of the grounds in section 317 applies, the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.

[39] The matter was dealt with on the papers. The Board made an indicative order in its Draft Decision. It has since received submissions and has made a final decision regarding penalty, costs, and publication.

Penalty

[40] The Board has the discretion to impose a range of penalties.ⁱⁱ Exercising that discretion and determining the appropriate penalty requires that the Board balance various factors, including the seriousness of the conduct and any mitigating or aggravating factors present.¹² It is not a formulaic exercise, but there are established underlying principles that the Board should take into consideration. They include:¹³

- (a) protection of the public and consideration of the purposes of the Act;¹⁴
- (b) deterring other Licensed Building Practitioners from similar offending;¹⁵
- (c) setting and enforcing a high standard of conduct for the industry;¹⁶
- (d) penalising wrongdoing;¹⁷ and
- (e) rehabilitation (where appropriate).¹⁸

[41] Overall, the Board should assess the conduct against the range of penalty options available in section 318 of the Act, reserving the maximum penalty for the worst cases¹⁹ and applying the least restrictive penalty available for the particular offending.²⁰ In all, the Board should be looking to impose a fair, reasonable, and

¹² *Ellis v Auckland Standards Committee* 5 [2019] NZHC 1384 at [21]; cited with approval in *National Standards Committee (No1) of the New Zealand Law Society v Gardiner-Hopkins* [2022] NZHC 1709 at [48]

¹³ Cited with approval in *Robinson v Complaints Assessment Committee of Teaching Council of Aotearoa New Zealand* [2022] NZCA 350 at [28] and [29]

¹⁴ Section 3 Building Act

¹⁵ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

¹⁶ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724

¹⁷ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

¹⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354; *Shousha v A Professional Conduct Committee* [2022] NZHC 1457

¹⁹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²⁰ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818

proportionate penalty²¹ that is consistent with other penalties imposed by the Board for comparable offending.²²

- [42] In general, when determining the appropriate penalty, the Board adopts a starting point based on the principles outlined above prior to it considering any aggravating and/or mitigating factors present.²³
- [43] Record of work matters are at the lower end of the disciplinary scale. The Board's normal starting point for a failure to provide a record of work is a fine of \$1,500, an amount which it considers will deter others from such behaviour. There are no aggravating factors. The Respondent has now provided a record of work. Its late provision has been taken into account as a mitigating factor. The penalty is reduced by \$500 to a fine of \$1,000.
- [44] The Complainant sought restrictive orders that are not within the Board's disciplinary powers and a more stringent penalty than that which was indicated. Whilst the impact on the Complainants is acknowledged, what has been sought is disproportionate to the conduct of failing to provide a record of work.
- [45] In response to the Draft Decision, the Respondent submitted:

6.Neverless i requst the board to reconsider my fines and penallty for anymore discount as you can see this was my first mistake with LBP

- [46] The Board had taken into account that this was the Respondent's first time before the Board in setting the indicative penalty. No new mitigating factors have been raised. The penalty order will not be changed.

Costs

- [47] Under section 318(4) of the Act, the Board may require the Respondent to pay the costs and expenses of, and incidental to, the inquiry by the Board. The rationale is that other Licensed Building Practitioners should not be left to carry the financial burden of an investigation and hearing.²⁴
- [48] The courts have indicated that 50% of the total reasonable costs should be taken as a starting point in disciplinary proceedings²⁵. The starting point can then be adjusted up or down, having regard to the particular circumstances of each case²⁶.

²¹ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²² *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354

²³ In *Lochhead v Ministry of Business Innovation and Employment* 3 November [2016] NZDC 21288 the District Court recommended that the Board adopt the approach set out in the Sentencing Act 2002.

²⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74

²⁵ *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society* CIV-2011-485-000227 8 August 2011

²⁶ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

- [49] The Board has adopted an approach to costs that uses a scale based on 50% of the average costs of different categories of hearings: simple, moderate and complex. The current matter was simple. Adjustments are then made.
- [50] Based on the above, the Board's costs order is that the Respondent is to pay the sum of \$500 toward the costs of and incidental to the Board's inquiry.

Publication

- [51] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public Register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act,²⁷ and he will be named in this decision, which will be available on the Board's website. The Board is also able, under section 318(5) of the Act, to order further publication.
- [52] Within New Zealand, there is a principle of open justice and open reporting, which is enshrined in the Bill of Rights Act 1990.²⁸ Further, as a general principle, publication may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing, and the courts have stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published.²⁹
- [53] Based on the above, the Board will not order any publication over and above the record on the Register, the Respondent being named in this decision, and the publication of the decision on the Board's website. The Respondent should note, however, that as the Board has not made any form of suppression order, other entities, such as the media or the Ministry of Business Innovation and Employment, may publish under the principles of open justice reporting.

Section 318 Order

- [54] For the reasons set out above, the Board directs that:

Penalty: Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$1,000.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$500 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(I)(iii) of the Act.

In terms of section 318(5) of the Act, the Respondent will be named in this decision, which will be published on the Board's website.

²⁷ Refer sections 298, 299 and 301 of the Act

²⁸ Section 14 of the Act

²⁹ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [55] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Right of Appeal

- [56] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱⁱⁱ.

Signed and dated this 24th day of June 2024



M Orange
Presiding Member

ⁱ **Section 318 of the Act**

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ **Section 318 Disciplinary Penalties**

- (1) *In any case to which section 317 applies, the Board may—*
- (a) *do both of the following things:*

-
- (i) *cancel the person's licensing and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
 - (2) *The Board may take only 1 type of action in subsection (1)(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
 - (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
 - (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
 - (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.*

iii Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
 - (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*